Filed 12/19/14 Cavic v. Gelman & Associates CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANNY CAVIC, Plaintiff and Appellant, v. GLENN M. GELMAN & ASSOCIATES et al., Defendants and Respondents.	G048510 (Super. Ct. No. 30-2011-00522908) ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed on November 26, 2014, be modified as follows:

1. On page 1, in the first sentence in the first paragraph, insert "legal malpractice claims againsPt Allen Liang and" so the sentence reads: "Danny Cavic appeals from the dismissal of his legal malpractice claims against Allen Liang and his accounting malpractice claims against Glenn M. Gelman & Associates and one of its accountants, Richard Squar (collectively, Gelman), when Cavic failed to post the requisite bond required of vexatious litigants."

2. On page 1, delete the second and third sentences of the first paragraph, namely, "Cavic contends the trial court erred in requiring him to post a bond. Cavic's claims against Gelman were part of a larger lawsuit in which he also sued an attorney, Allan Liang, for legal malpractice."

3. On page 4, in the first sentence of the first new paragraph on the page, insert "Liang's and" and substitute "motions" for "motion" so that the sentence reads: "The trial court heard and granted Liang's and Gelman's vexatious litigant motions."

4. On page 4, in the first new paragraph on the page, insert before "Cavic now appeals" a new penultimate sentence, as follows: "The trial court also granted Liang's motion to dismiss after Cavic failed to post a bond as to Liang."

5. On page 6, in the second sentence of the first paragraph in Subsection B, insert "Liang and" so that the sentence reads: "Here, Cavic filed his claims against Liang and Gelman in propria persona and later hired an attorney to pursue them."

6. On page 8, insert in the citation in the middle of the first new paragraph on the page "; see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [fairness precludes reaching issues raised in appellant's reply brief]" so that the citation string reads: "(*Sourcecorp, Inc. v. Shill* (2012) 206 Cal.App.4th 1054, 1061-1062; see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [fairness precludes reaching issues raised in appellant's reply brief].)"

7. On page 10, after the paragraph that ends with the citation clause ". . . ['conclusory claims of error will fail']" insert a new paragraph as follows:

> Similarly, Cavic nowhere articulates clearly any theory of appeal concerning the trial court's dismissal of his claims against Liang on vexatious litigant grounds. As noted, we reject his claim the applicable standard required only a prima facie showing of a likelihood of success on his causes of action against Liang, and we are unable to discern any cogent fallback position in his brief. He argues *Liang* distorted the facts in his vexatious litigant motion, but on appeal we review the *trial court's* actions. We must presume the trial court correctly applied the law and simply found Cavic's arguments unpersuasive. (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.) Cavic reiterates at length

his claims Liang committed legal malpractice, but he nowhere ties those claims to the trial court's vexatious litigant ruling, the pertinent standard of review, or a coherent theory of appeal. As noted, we cannot guess at or attempt to formulate on behalf of the appellant arguments for reversal; to the contrary, the opposite is true. (*Ibid.*) Cavic argues an attorney accused of malpractice should be estopped from invoking against a former client the statutory shield against vexatious litigants. But nothing in the statute suggests such an exception, and we decline to engraft one. (See *In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, 628 ["The Legislature declares state public policy, not the courts"].)

8. On page 10, delete the second sentence in the first new paragraph under Subsection E, namely, "But Cavic in his opposition to Gelman's vexatious litigant motion nowhere requested the trial court to consider the proposed complaint, nor suggested that anything in the proposed complaint would defeat Gelman's motion." Insert in place of that deleted sentence the following sentences:

But Cavic in his opening brief does not identify with record citations where he preserved this argument below. It is therefore waived. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 ["'It is the duty of a party to support the argument in its briefs by appropriate reference to the record, which includes providing exact page citations'"].) Absent the requisite record cites, we may not simply assume Cavic in opposition to the vexatious litigant motion developed and preserved a motion for the trial court to consider an amended complaint, nor showed precisely how a proposed amendment would prevent the vexatious litigant finding.

9. On page 11, insert in the first sentence of the disposition the words "against Liang and" so that it reads: "The trial court's order dismissing Cavic's lawsuit against Liang and against Gelman and Squar for failure to post the requisite vexatious litigant bond is affirmed."

10. On page 11, in footnote 2, delete the words "or his suit against Liang".

This modification does not effect a change in the judgment. The petition for rehearing is DENIED.

_____
ARONSON, J.

WE CONCUR:

_____
BEDSWORTH, ACTING P. J.

_____
MOORE, J.

Filed 11/26/14 Cavic v. Gelman & Associates CA4/3 (unmodified version)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANNY CAVIC, Plaintiff and Appellant, v. GLENN M. GELMAN & ASSOCIATES et al., Defendants and Respondents.	G048510 (Super. Ct. No. 30-2011-00522908) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed.

Glen Broemer for Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, Fredric W. Trester, Steven J. Renick and Victor Rocha for Defendants and Respondents.

* * *

Danny Cavic appeals from the dismissal of his accounting malpractice claims against Glenn M. Gelman & Associates and one of its accountants, Richard Squar (collectively, Gelman), when Cavic failed to post the requisite bond required of vexatious litigants. Cavic contends the trial court erred in requiring him to post a bond. Cavic's claims against Gelman were part of a larger lawsuit in which he also sued an attorney, Allan Liang, for legal malpractice. Cavic asserts the trial court erred in considering Gelman's motion to require that he post a bond as a vexatious litigant because Liang already filed a motion to designate Cavic a vexatious litigant. Cavic insists Liang's motion triggered a stay of the entire litigation, preventing Gelman from filing its vexatious litigant motion until the trial court resolved Liang's. Cavic also argues the vexatious litigant bond should not apply to litigants who obtain counsel. He further argues the "reasonable probability" of success a vexatious litigant must demonstrate to avoid the requirement of posting a bond in his or her current lawsuit requires only a prima facie showing of a probability of success. Finally, he contends the trial court should have considered his proposed second amended complaint before finding he was a vexatious litigant and dismissing his complaint for lack of a bond. As we explain, the trial court did not err and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

This is the fourth appeal arising from several different lawsuits triggered when a Newport Beach restaurant tenant in which Cavic obtained an interest, Nevada Atlantic Corporation (Nevada Atlantic or Nevada), failed to obtain permission from its lessor, WREC Lido Venture, LLC (WREC Lido), to assign the lease to an interested third party. Nevada Atlantic persuaded the trial court in an initial lawsuit that a landlord's decision to reject an assignment must meet an objective reasonableness standard. But on appeal, a panel of this court explained: "[A] commercial landlord may unreasonably withhold its consent to a proposed assignment where the lease requires the landord's

consent to the assignment and gives the landlord the right to withhold its consent 'for any reason whatsoever and for no reason.'" (*Nevada Atlantic Corp. v. WREC Lido Venture, LLC* (Dec. 2, 2008, G039825) [nonpub. opn.].)

In a subsequent lawsuit, Cavic joined Nevada Atlantic in suing WREC Lido again, this time for lost profits based on alleged breaches of the lease in failing to make repairs or maintain the premises, raising the rent, and failing to advertise on behalf of commercial tenants. A panel of this court upheld the trial court's nonsuit judgment, observing as to Cavic that "there was no evidence he was a party to the lease." (*Cavic v. WREC Lido Venture, LLC* (Aug. 7, 2012, G045611) [nonpub. opn.] (*Cavic II*).)

Cavic returned to court to sue one of WREC Lido's attorneys, Todd Green, for allegedly interfering with Squar in the *Cavic II* litigation by improperly communicating with him. *Cavic II* had noted Nevada Atlantic's claim that "Squar changed his opinion regarding the existence of lost profits after communicating with Green." (*Cavic II*, *supra*.) *Cavic II* observed that a "short chain of e-mails comprise[d] the sole basis for Nevada Atlantic's request to designate a new expert, based on the theory the e-mails show[ed] Green improperly influenced Squar . . . ." (*Ibid.*) The e-mails in *Cavic II*, however, showed only that Green had permission to contact Squar to schedule his deposition and Green also contacted Squar directly instead of through counsel to request an expert report Squar had prepared for another trial, which Squar declined to provide Green. (*Ibid.*) In suing Green after the *Cavic II* litigation terminated in a nonsuit, Cavic provided no meaningful additional evidence of Green's alleged interference with Squar. The trial court granted Green's anti-SLAPP motion because the communications occurred in the litigation context, which a panel of this court upheld in *Cavic v. Green* (Nov. 26, 2012, G046772) [nonpub. opn.].)

Cavic then returned to court to file this malpractice suit against Squar (and Gelman) and against Liang, his attorney in *Cavic II*, and Cavic also filed or maintained at least one other pending lawsuit against WREC Lido. As noted, Liang filed a motion to

designate Cavic a vexatious litigant and require that Cavic post security before proceeding with this lawsuit, and Squar (and Gelman) followed with their own vexatious litigant motion. Meanwhile, another trial judge had declared Cavic a vexatious litigant in the WREC Lido litigation.

The trial court heard and granted Gelman's vexatious litigant motion. The trial court explained in its written order that it found "plaintiff is a vexatious litigant, as defined in CCP 391(b)(4), and that moving party has shown that there is not a reasonable probability that plaintiff will prevail in the litigation against moving defendant." Gelman had requested a bond amount of $136,018.23, which the trial court reduced to $63,536.46, and when Cavic failed to post the security, the trial court granted Gelman's motion to dismiss the action as to Gelman and Squar. Cavic now appeals.

II

DISCUSSION

A. *No Stay Prevented Gelman from Filing Its Motion for Security*

Cavic contends the trial court erred in considering Gelman's motion to require him to post security as a vexatious litigant because the attorney codefendant Liang already filed a similar motion under Code of Civil Procedure section 391.1 (all further references are to this code). Section 391.1 provides that a defendant may file a motion "for an order requiring the plaintiff to furnish security . . . based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he or she will prevail in the litigation *against the moving defendant*." (Italics added.) The vexatious litigant statute defines the requisite "security" as "an undertaking to assure payment . . . of the party's reasonable expenses, including attorney's fees . . . incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant." (§ 391, subd. (c).)

Cavic relies on section 391.6 for his position a blanket stay is required whenever one defendant files a motion for security. Section 391.6 states: "Except as provided in subdivision (b) of Section 391.3, when a motion pursuant to Section 391.1 is filed prior to trial[,] the litigation is stayed and the *moving defendant* need not plead, until 10 days after the motion shall have been denied, or if granted, until 10 days after the required security has been furnished and the *moving defendant* [is] given written notice thereof."[1] (Italics added.)

"When interpreting a statute our primary task is to determine the Legislature's intent. [Citation.] In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent." (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826; *People v. Jones* (1993) 5 Cal.4th 1142, 1146.) As our Supreme Court has explained, "'The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.' [Citation.] If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls." (*Fitch v. Select Products Co*. (2005) 36 Cal.4th 812, 818.)

In support of his position, Cavic invokes the general observation recited in two cases that "[w]hen the defendant filed his motion under the vexatious litigant statute . . . it served to stay all proceedings in that action." (*Muller v. Tanner* (1969) 2 Cal.App.3d 438, 443; see *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1215.) But neither of these cases involved multiple defendants, and therefore they do not apply. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127 [""""It is axiomatic that cases are not authority for propositions not considered""""].)

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[1] Section 391.3, subdivision (b)'s exception, which neither party suggests is applicable, operates when the trial court determines the vexatious litigant's lawsuit not only "has no merit" but "has been filed for the purposes of harassment or delay." In these circumstances, the trial court may not allow the litigant the opportunity to pursue the lawsuit upon posting a bond, but rather "shall order the litigation dismissed."

The plain and repeated use of the phrase, "the moving defendant," throughout the vexatious litigant statute clearly demonstrates the Legislature did not intend to preclude more than one defendant at a time from seeking relief under the statute. Instead, the relief afforded against vexatious litigants is available to all moving defendants. The stay provision itself notes "the moving defendant" need not file an answer or other pleading until its motion is denied or within 10 days of receiving notice the motion is granted. (§ 391.6.) Similarly, the core provision of the statute provides that the plaintiff's reasonable probability of prevailing must be determined with respect to plaintiff's case against "the moving defendant" (§ 391.1; § 391.3, subd. (a) [same]), and therefore necessarily implies that multiple defendants may seek relief under the statute. Nothing suggests they must do so serially only after the trial court resolves first one motion and then another or more in multi-defendant cases, which would only add delay and expense to the litigation. Cavic suggests an in propria persona plaintiff who is alleged to be a vexatious litigant unfairly may be overwhelmed by multiple motions, but there is nothing unfair in requiring a plaintiff who has chosen to sue multiple defendants to meet their vexatious litigant claims. Cavic's challenge fails under the plain terms of the statute offering relief to each and every "moving defendant."

B. *Bond Requirement Applies Even if an Attorney Represents the Litigant*

Cavic argues a vexatious litigant bond should not be required if the person obtains an attorney to continue the litigation. Here, Cavic filed his claims against Gelman in propria persona and later hired an attorney to pursue them. He argues "[t]here are good grounds for requiring the bond to be extinguished, or at the very least providing for a re-hearing once counsel has been obtained" because "'[a]ttorneys are governed by prescribed rules of ethics and professional conduct, and, as officers of the court, are subject to disbarment, suspension, and other disciplinary sanctions not applicable to

litigants in propria persona.'" (Quoting *Taliaferro v. Hoogs* (1965) 236 Cal.App.2d 521, 527, fn. 10 (*Taliaferro*).)

Taliaferro is inapposite; it rejected a challenge asserting the vexatious litigant statute violated equal protection because it applies to proceedings initiated by in propria persona plaintiffs and not those with counsel. The two classes are dissimilar for the reasons *Taliaferro* noted, but *Taliaferro* did not suggest retaining an attorney after a history of vexatious litigation absolves the plaintiff of the bond requirement.

To the contrary, established case law squarely rejects Cavic's claim. As the court in *Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12 Cal.App.4th 838 (*Camerado*) explained, the vexatious litigant statute applies "to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past." (*Id.* at p. 842.) We see no reason to depart from this authority when a vexatious litigant hires an attorney in the midst of the litigation. It would be a waste of judicial resources and invite gamesmanship for the trial court to schedule a hearing on a defendant's vexatious litigant motion, sort through the issues at the hearing and require a bond, only to render the hearing a nullity and the bond void if the vexatious litigant hires an attorney. If that were the case, the vexatious litigant simply could redirect to his own benefit funds for new counsel that should have been reserved for a bond and the defendant's protection, destroying the intended deterrent effect of the vexatious litigant statute. Consequently, *Camerado* controls and there is no merit in Cavic's position.

C. *Cavic May Not Collaterally Attack the Predicate Vexatious Litigant Finding*

In granting Gelman's motion for security, the trial court found that "plaintiff is a vexatious litigant, as defined in CCP 391(b)(4)." Under that section, a party is a vexatious litigant if he or she "[h]as previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence." (§ 391, subd. (b)(4).)

Cavic does not dispute that in the midst of this litigation, a trial judge (Judge David McEachen) in Cavic's separate pending lawsuit against WREC Lido found he was a vexatious litigant. Cavic suggests he filed a motion under section 473 to revisit and overturn that vexatious litigant finding, but the results of that motion are not before us.

Cavic does not dispute in his opening brief that the predicate proceeding in which he was declared a vexatious litigant was "based upon the same or substantially similar facts, transaction, or occurrence," as required in subdivision (b)(4) of section 391. He belatedly attempts in his reply brief to distinguish the underlying nature of the other lawsuit, but new matters raised in an appellant's reply brief are forfeited. (*Sourcecorp, Inc. v. Shill* (2012) 206 Cal.App.4th 1054, 1061-1062.) Instead, Cavic in his opening brief argues simply that he is not a vexatious litigant. He does not dispute the existence of the predicate vexatious litigant finding, and therefore his challenge amounts to a claim that Judge McEachen reached the wrong conclusion in designating him a vexatious litigant. Collateral estoppel, however, applies in vexatious litigant proceedings to bar such challenges. (*Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 223.)

D. *A Mere Prima Facie Showing of a Probability of Success Is Not Enough for a Vexatious Litigant to Avoid Posting Security*

Cavic contends the trial court erred in concluding "there is not a reasonable probability that plaintiff will prevail in the litigation against moving defendant." Cavic argues the "reasonable probability" standard in section 391.1 requires of the vexatious litigant only a prima facie showing he or she will prevail in the litigation. Not so. A prima facie showing merely "is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.) In the summary judgment context for example, a party opposing summary judgment makes the requisite prima facie showing if the evidence simply would allow a reasonable trier of fact to find in favor of that party at trial. (*Id.* at p. 857.)

But the prima facie standard does not apply in the vexatious litigant context because it asks only whether a reasonable factfinder *could* find in favor of one party or another. To the contrary, the vexatious litigant statute vests with the trial court an "evaluative function" and authority to "weigh the evidence" in reaching its own conclusion whether there is a reasonable probability the litigant will prevail on the merits. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 786 (*Moran*).) The plaintiff in *Moran* argued the vexatious litigant statute's "reasonable probability" standard required only a "prima facie showing," which the Supreme Court rejected. (*Id.* at p. 784.) Consequently, Cavic's contention is without merit.

In any event, Cavic's assertion he established the requisite "reasonable probability" of success in his claims against Gelman fails under *any* standard. As a panel of this court explained in upholding WREC Lido's nonsuit against Cavic, he was not a party to the restaurant lease with Nevada Atlantic that WREC Lido allegedly breached. (*Cavic II*, *supra*, G045611 [nonpub. opn.].) The evidence in Cavic's lawsuit here against Gelman continues to reflect that at best Cavic obtained only a shareholder's interest in Nevada Atlantic, and therefore was not himself a party to the lease with WREC Lido. The gravamen of Cavic's complaint against Gelman is that Squar's negligence in failing to properly calculate lost profit damages from the alleged breach of the WREC Lido-Nevada Atlantic lease injured Cavic. But as the nonsuit illustrates, any lost profit damages would have belonged only to Nevada Atlantic as a party to the lease, not Cavic. Consequently, Cavic made no showing Gelman and Squar's alleged negligence in the WREC Lido lease dispute caused *Cavic* any damages except in a derivative fashion as a Nevada Atlantic shareholder. But as illustrated by the nonsuit, the damages in such circumstances are for the corporation to assert, not a shareholder, and Cavic therefore failed to show the requisite reasonable probability of success in prevailing on his negligence claim against Gelman and Squar.

In his reply brief, Cavic asserts he and Nevada Atlantic assigned their assignable interests back and forth several times, but concedes he "assign[ed] all of his claims back to Nevada." Apparently recognizing that would leave him without any conceivable basis for his suit in his individual capacity against Gelman and Squar, Cavic adds that his "fraud claims cannot be assigned." He asserts "[i]t is undisputed that Squar represented Cavic and Nevada," but he offers no indication how Squar allegedly "committed fraud in his contractual dealings with Cavic" personally rather than in the context of WREC Lido's alleged breach of the lease. The appellate court may not be tasked with developing arguments for an appellant or to formulate or piece together a basis for reversal, nor to scour the record on the appellant's behalf. (See, e.g., *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852; *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) Accordingly, Cavic fails his burden to demonstrate error and overcome the presumption that the judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see *People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co* (2002) 104 Cal.App.4th 1189, 1200 ["appellant must present a factual analysis and legal authority on each point made or the argument may be deemed waived"]; *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["conclusory claims of error will fail"].)

E. *No Error in Failing to Consider Proposed Second Amended Complaint*

Cavic argues the trial court erred in requiring him to post security as a vexatious litigant without considering his proposed second amended complaint. But Cavic in his opposition to Gelman's vexatious litigant motion nowhere requested the trial court to consider the proposed complaint, nor suggested that anything in the proposed complaint would defeat Gelman's motion. (See *People v. Partida* (2005) 37 Cal.4th 428, 435 [trial court does not err "in failing to conduct an analysis it was not asked to conduct"].) In his reply brief, Cavic notes he made a comment at a hearing on the motion

in which he referenced the proposed amended complaint. But this belated remark gave Gelman no fair opportunity to prepare for the hearing to address anything in the proposed complaint, and afforded the court no real opportunity to consider any bearing the proposed complaint might have on the motion. Cavic's challenge therefore fails.[2]

III

DISPOSITION

The trial court's order dismissing Cavic's lawsuit against Gelman and Squar for failure to post the requisite vexatious litigant bond is affirmed. Respondents are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.

[2] Cavic's requests for judicial notice are denied to the extent they pertain to matters not presented to the trial court or to his suit against Liang; in any event, nothing in any of the requests for judicial notice changes the outcome here and they are therefore denied as irrelevant.